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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JEFF KOONS,

Petitioner,

v.

ART ROGERS and SONNABEND GALLERY, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a work of art that would otherwise qualify for the copyright defense of "fair use" becomes a form of actionable commercial exploitation simply because its creator was paid for that work.

2. Whether an artist who imitates but transforms a prior work in order to criticize what it represents may be held liable for copyright infringement simply because the two works are superficially similar and the prior work is not sufficiently well known to be a recognizable object of the critique.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeff Koons seeks review of a decision of the United States Court of Appeals for the Second Circuit holding that a fine-art sculpture created by him infringed the copyright in a photograph previously published as a notecard by respondent Art Rogers.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 960 F.2d 301, and reprinted at Pet. App. 1a. The opinions of the United States District Court for the Southern District of New York are reported at 751 F. Supp. 474 and 777 F. Supp. 1 and reprinted at Pet. App. 25a and 41a.

JURISDICTION

The Court of Appeals entered judgment on April 2, 1992, and denied a timely petition for rehearing on

May 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 107 of title 17 of the United States Code provides as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT

This case involves a copyright infringement claim brought by respondent Art Rogers, a professional photographer who in 1980 was commissioned to shoot a black-and-white portrait of two people holding eight puppies. In 1984, Rogers licensed the publication of this photograph on notecards distributed to stores around the country. Petitioner Jeff Koons is a prominent artist and sculptor who in 1988 created a large, brightly colored sculpture entitled *String of Puppies*. This sculpture was modeled to a considerable extent on the figures in the

notecard. It was initially exhibited at the Sonnabend Gallery in New York as part of a body of 20 sculptural works under the title "Banality Show."

Like the other art works that Koons produced for this exhibition, *String of Puppies* was intended in part as a criticism of a commercial, mass-produced image from popular culture. As the Second Circuit recognized, petitioner "works in an art tradition dating back to the beginning of the twentieth century," Pet. App. 4a—a tradition characterized by use of commonplace images or objects in the creation of new works. Many contemporary artists, sometimes referred to as "post-modernists," "draw upon the artistic movements of Cubism and Dadaism, with particular influence attributed to Marcel Duchamp, who in 1913 became the first to incorporate manufactured objects (readymades) into a work of art." *Id.* at 15a. They typically incorporate "images into works of art to comment critically both on the incorporated object and the political and economic system that created it." *Id.* In this process, "the meaning of the original object [is] extracted and an entirely new meaning set in place." *Id.* at 4a.[1] One well-known example is the work of Andy Warhol. Jeff Koons is recognized as one of the most important contemporary visual artists in this tradition.[2]

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[1] *See* C. Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism," in *Art After Modernism* 205 (B. Wallis ed. 1989) ("The appropriated image may be a film still, a photograph, a drawing; it is often itself already a reproduction. However, the manipulations to which these artists subject images work to empty them of their resonance, their significance, their authoritative claim to meaning."). *See generally* H.H. Arnason, *The History of Modern Art* 635-91 (3d ed. 1986); K. Varnedoe & A. Gopnik, *High & Low: Modern Art/Popular Culture* 369-403 (1990).

[2] See Gibson, "Decade in Review," *Sculpture*, May/June 1989, at 23 ("Koons' kitchen-objects represent the climax of the so-called Simulationist movement, in which artists make and exhibit works of art based on real-world commodities to draw attention to, and criticize, what they view as the excessively commercial character of the art market."); M. Brenson, *Art: Whitney Biennial's New Look*, N.Y. Times, Apr. 10, 1987 at C24 ("Mr. Koons has formulated one of the

Thus, in making *String of Puppies*, petitioner instructed the artisans assisting him to recreate in sculptural form various features of the Rogers notecard because his goal was to reproduce what he considered a typical example of popular culture. But Koons also sought to transform the notecard image in order to make his own radically different artistic statement. This transformation included a number of very significant changes —using the sculptural medium and a larger-than-life scale, adding vivid painting (especially the blue on the dogs), adding daisies to the hair of the two people and exaggerating their facial expressions for a vacuous effect, and placing a bulbous nose on each puppy.[3] As a result of these changes, the overall aesthetic effect of the sculpture is quite distinctive. The notecard presents a scene that the court below described as "charming", Pet. App. 11a, while Koons' sculpture is highly disturbing. As petitioner put it, his goal was to take "the sculpture out of the realm of reality into the realm of unreality but without eliminating a sense of believability." CA Jt. App. at 789.[4] He felt that he had "stripped away entirely the personality of the notecard picture and substituted [his] own values and [his] own message." *Id.* at 791.

In keeping with Koons' general practice, only three edition copies of the sculpture exist.[5] No further copies were

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most jaded and puritanical statements made by an artist about consumer culture.").

[3] Photographs from the record showing the notecard, a frontal view of the Koons sculpture, and the sculpture displayed as part of the larger Banality show are reproduced in the appendix to this petition at pages 48a, 49a & 50a.

[4] *See also* K. Varnedoe & A. Gopnik, *supra*, at 396 (describing the "Banality" show) ("Koons's figurines were shocking because of the way they looked. They were nightmarish—devil dolls, in which the insipid language of the cartoons' over-accentuated contours and biscuit glazes was suddenly made hard and staring.").

[5] An initial proof, traditionally known as an "artist proof," was kept by Koons as a personal record of his work and was not made available for purchase.

ever intended (and New York law would forbid further copies). All three edition works were purchased by collectors for a total of $367,000. Respondent's complaint, filed in 1989 in the U.S. District Court for the Southern District of New York, claimed copyright infringement and unfair competition under the Lanham Act and state law. On December 10, 1990, the district court granted respondent's motion for summary judgment on the issue of copyright infringement. Pet. App. 40a. It held that the photograph and the sculpture are "substantially similar," and rejected the asserted defense of "fair use" as a matter of law.[6]

On appeal, the United States Court of Appeals for the Second Circuit affirmed. It agreed that the two works are substantially similar, adopting an approach that asked only whether elements of the works are recognizably similar without taking into account their overall differences in terms of aesthetic appeal or message. Pet. App. 10a. With respect to the issue of "fair use," the Second Circuit referred to each of the four factors set out in the statute. 17 U.S.C. § 107. Disregarding Koons' own affidavit, it held, first, that the "purpose" of Koons' sculpture was primarily for profit and thus exploitive. Pet. App. 14a. In so doing, it relied on the fact that collectors had paid high prices for the sculpture. The court flatly rejected as inapplicable the statutory concepts of "criticism" or "comment." *Id.* It also refused to consider the sculpture as a form of "parody," construing this term to apply only where the original work is sufficiently well known that it

[6] The court held that the question of damages presented disputed issues requiring a trial. It also ruled, however, that Rogers should receive the artist's proof of the sculpture, even though Koons had never offered it for sale. Believing that any actual turnover of his artist's proof would not be required until the end of the case, Koons loaned it to a museum in Germany for a temporary exhibition. The district court held him in contempt and ordered the proof returned to Koons' warehouse in New York. This aspect of the case is not raised in the instant petition.

will be recognized as the object of the parody by viewers of the later work. *Id.* at 16a.

Turning to the second and third factors, the court of appeals then held that the creative and imaginative "nature" of the photograph militated against a finding of fair use, and that the "amount and substantiality" of the copying done by Koons was greater than would have been permitted even in a true parody case. *Id.* at 17a. Finally, the court of appeals ruled that there was no possible dispute with respect to the fourth fair-use factor, the "effect of the use on the potential market for or value of the copyrighted work." Here, petitioner had argued that the two works appealed to entirely different audiences and that the record contained no evidence establishing even a meaningful possibility (much less a likelihood) of market injury. The court, however, invoked a presumption of market injury based on its prior conclusion that petitioner's work was "primarily commercial in nature." *Id.* at 20a (citing *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 451 (1984)). Applying this presumption, it concluded that it was "obviously not implausible" that the sculpture could interfere with a sale by respondent of the right to produce a derivative sculpture based on the photograph, Pet. App. 20a,[7] even though a true derivative would convey the "charming" message of the Rogers photograph, while Koons' "horrific" sculpture did not do so.

REASONS FOR GRANTING THE WRIT

The central issue in this case is what standards a court should apply when a plaintiff in an infringement action seeks to rebut a "fair use" defense by labelling the defendant's work "commercial" and thus exploitive. As the Second Circuit's decision illustrates, application of proper

[7] The court also unjustifiably speculated that Koons might sell photographs of his sculpture, thereby limiting "Rogers' potential market for the sale of the notecards, in addition to any other derivative use he might plan." Pet. App. 20a.

standards to resolve the question of commerciality is critical, because a court's characterization of a challenged work as commercially exploitive automatically leads to a finding of liability for infringement. At the same time, that decision demonstrates the need for clarification of the applicable standards—both in fair-use cases generally and in the specific context of cases involving works of parody or satire. In the absence of such guidance, the lower courts are producing inconsistent and unpredictable decisions, often demonstrating little awareness of the basic principles that should distinguish actionable infringement from fair use. Moreover, if left undisturbed, the Second Circuit's ruling will have a severe practical impact, not only on artists like petitioner working in the "post-modern" tradition but also on other artists and authors who may wish to "use" prior works in legitimate, and often critical, ways.

While this Court has in recent years addressed various aspects of fair use, it has not established clear rules for applying the first factor set forth in the statute: "the purpose and character of the use, including whether such use is of a commercial nature." 17 U.S.C. § 107. The need for such clear rules was greatly heightened when this Court, in *Sony Corp. of America v. Universal City Studios*, created new presumptions that commercial uses are "unfair" and, more specifically, that any commercial use causes market injury to the creator of the prior work. 464 U.S. at 449, 451. After *Sony*, a court's inquiry into "commercial use" under the first fair-use factor has become critical to a determination of market injury, the "'most important, and indeed, central'" factor in the fair-use context. *Stewart v. Abend*, 110 S. Ct. 1750, 1769 (1990) (quoting 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A], at 13-102.4 ("Nimmer")). Indeed, as this case illustrates, labelling a work as commercial exploitation, when combined with the *Sony* presumptions, permits a court to bypass altogether a meaningful separate inquiry into market injury.

This approach might not be a matter of serious concern if the Second Circuit had addressed the "commercial use" question in a way that took into account the fundamental purpose of the fair-use privilege. This privilege is designed to allow subsequent authors and artists to use prior works in the creation of new ones that communicate new and distinct messages and do not impinge on valid commercial rights in the prior works. But the court adopted reasoning that has little or nothing to do with this underlying purpose. It focused first on the fact that petitioner was paid for his sculpture, even though that fact is equally present in virtually every fair-use case. It then ruled out characterization of the sculpture as a form of social criticism or "parody" based on another fact (the relative obscurity of the Rogers photograph) that has no logical connection to the policies underlying the fair-use defense.

The result was a ruling that ultimately makes no sense. While Koons' idiosyncratic sculpture certainly resembles the Rogers "charming" photograph in a superficial way, it also constitutes an independent act of expression about the "banality" of those aspects of our culture typified by the photograph. To suggest that the sculpture, with its own distinctive message and audience, affected the market for the photograph or for derivative works faithfully based on the photograph is absurd. And it is equally absurd to suggest that Koons selected the photograph as a model in order to "exploit" the creativity of respondent.

That the Second Circuit could nevertheless find infringement as a matter of law in this case is, by itself, compelling evidence of the need for action by this Court. Copyright law strikes a "difficult balance" between two goals: (1) safeguarding valid commercial rights of authors and artists in order to encourage their expression and (2) leaving ample room for additional creative efforts by others. *Sony Corp. of America v. Universal City Studios*, 464 U.S. at 429. The fair-use privilege helps to

strike this balance, by preventing " 'rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster.' " *Stewart v. Abend*, 110 S. Ct. at 1768 (quoting *Iowa State Univ. Research Found. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)). The Second Circuit's almost reflexive condemnation of petitioner's work as commercial exploitation—an approach that is, unfortunately, far from unique—demonstrates the need for review by this Court in order to ensure that copyright law continues to be a vehicle for encouraging, rather than suppressing, desirable and legitimate forms of expression.

I. THE RULING BELOW RAISES ISSUES OF CRITICAL IMPORTANCE TO THE PROPER ADMINISTRATION OF THE COPYRIGHT LAWS.

1. The importance of this case reflects the central role of the fair-use doctrine in establishing the proper scope of copyright protection. Like any copyright case, this one ultimately requires assessment of specific facts relating to the features of unique creative works. But the *approach* adopted by the Second Circuit severely distorts that assessment and thus threatens a more general disruption of the careful balance reflected in copyright law.

"The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' " *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1290 (1991) (citations omitted). In pursuit of this goal, copyright law joins patent law in seeking to respect *both* "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony Corp. of America v. Universal City Studios*, 464 U.S. at 429.[8]

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[8] *See also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 109 S. Ct. 971, 975 (1989) ("From their inception, the federal patent laws have embodied a careful balance between the need to promote

At its heart, copyright law thus involves a utilitarian calculus about what degree of protection for original works will foster the greatest degree of creative activity. In this process, " 'reward to the [copyright] owner [is] a secondary consideration,' " justified only as a means to " 'induce release to the public of the products of his creative genius.' " *Id.* (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)).

The fair-use doctrine helps to strike the proper balance by authorizing artists and authors to "use" prior works in the creation of new ones that express new, and often critical, messages without depriving existing copyright holders of the commercial incentives that encourage creativity. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549-50 (1985); *id.* at 581 n.2 (Brennan, J., dissenting). Drawing from the case law, Congress in 1976 listed four factors to be applied to evaluating a fair-use defense.[9] This codification, however, has not proved successful in providing structure and predictability in this important area of the law. The statutory factors have an "almost infinite elasticity . . . [and a] concomitant inability to resolve difficult questions." 3 Nimmer, § 13.05[A][5], at 13-102.6. All too often, "the factors . . . tend to degenerate into post-hoc rationales for antecedent conclusions, rather than serving as tools for analysis." *Id.* at 13-102.10.

The solution, as this Court has suggested, is to give primary importance to the fourth statutory factor: the actual or potential effect of the subsequent use on the mar-

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innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.").

[9] These four factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

ket value of the prior work or its derivatives. *See Stewart v. Abend*, 110 S. Ct. at 1769; *Harper & Row, Publishers, Inc. v. Nation Enters*, 471 U.S. at 566. Such an approach correctly looks to whether the new work in some way fulfills the same "function" as the prior work, *see* Nimmer § 13.05[B], and thus threatens to interfere with the commercial incentives that are the "engine of free expression" under the copyright laws, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. at 558.

The Second Circuit's decision in this case, however, exemplifies a far less discerning approach, one that courts tend to apply when they first address another factor—the "purpose and character of the use"—and determine that the use was "commercial" in nature. As we have suggested, this problem has arisen because this Court created a presumption that commercial use causes market injury, *Sony Corp. of America v. Universal City Studios*, 464 U.S. at 451, but has not established a workable definition of "commercial use" that provides predictable standards or that would justify the *Sony* presumption across the board. As a result, a subsequent use of a prior work may undeservedly be labelled "commercial" in nature, thereby effectively forfeiting the fair-use defense, even where the use communicates a new and distinct message and even where there is no real evidence of actual or potential market injury.

2. Thus, here, the Second Circuit placed great reliance on a single fact in determining that petitioner was engaged in commercial exploitation: he was well paid for his sculpture. *See* Pet. App. 14a ("Koons' substantial profit . . . militates against the finding of fair use").[10]

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[10] *See also* Pet. App. 4a (Koons' "works sell at very substantial prices, over $100,000"); *id.* at 6a ("Three of the four copies made were sold to collectors for a total of $367,000 . . . ."). The court also saw fit to note that "[w]hile pursuing his career as an artist, [petitioner] also worked until 1984 as a mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker." *Id.* at 4a.

In so doing, the court was not alone. The case law in the lower courts reflects abundant confusion over whether receipt of compensation renders a particular use "commercial" under the first statutory factor.[11] In reality, however, it should be obvious that the all-important commercial/noncommercial distinction cannot depend on the mere fact of receipt of compensation. After all, artists and authors of fiction—just like the critics, news reporters and scholars whose works are cited in the statute as examples of presumptively "fair" use[12]—nearly always seek to be paid for what they create.[13]

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[11] *See Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152 (9th Cir. 1986) (reproduction of magazine excerpt for purposes of fundraising by nonprofit groups constitutes commercial use); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) (reproduction of photograph in magazine was a commercial use); *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980) (production of biography of public figure for network broadcast constitutes commercial use); *Association of American Medical Colleges v. Mikaelian*, 571 F. Supp. 144, 152 (E.D. Pa. 1983) (use for educational purposes by for-profit organization is commercial), *aff'd per curiam*, 734 F.2d 3 (3d Cir. 1984). *But see New Era Publications Int'l ApS v. Carol Publishing Group*, 904 F.2d 152, 156 (2d Cir.) (publication of biography is noncommercial despite anticipated profits), *cert. denied*, 111 S. Ct. 297 (1990); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307-08 (2d Cir. 1966) (same), *cert. denied*, 385 U.S. 1009 (1967); *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 210-11 (D. Mass. 1986) (reproduction in for-profit magazine of prior works for purposes of commentary is noncommercial). *See also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986) ("The commercial nature of a use is a matter of degree, not an absolute . . . ."), *cert. denied*, 481 U.S. 1059 (1987).

[12] 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.")

[13] Nor can the outcome turn on the amount of the compensation. It hardly makes sense to give lesser leeway to an artist merely because his prominence in the art world makes all of his works more valuable.

This Court has at least suggested the proper answer to this problem, in its application of the fair-use factors in *Harper & Row, Publishers, Inc. v. Nation Enters.*, *supra*. There, the Court asked whether the use had the purpose of "supplanting [one of] the copyright holder's commercially valuable right[s]." 471 U.S. at 562. It concluded that a magazine's quotation of extracts from unpublished memoirs was commercial because the magazine had usurped the right of first publication that had already been sold to others. *Id.* Applied generally, this approach would mean that the first fair-use factor would be assessed in conjunction with the fourth factor—potential market injury. A challenged use would be "commercial" if it had the potential to supplant demand for the original or appropriated a valuable commercial right that could otherwise have been sold in the marketplace.[14] Such an approach would assure that functional, market-based considerations always retain their primary role in determining whether a particular use will interfere with the commercial incentives that promote free expression.

Here, as we have suggested, that approach could not have led to condemnation of petitioner as a commercial exploiter as a matter of law. Petitioner here relied on the obvious fact that his highly disturbing, limited-edition sculpture, part of a gallery show criticizing the "banality" of popular culture, in no way competed in the marketplace with respondent's photograph or its potential derivatives. This meant that the value of the photograph to Rogers remained unaffected. The Second Circuit nevertheless

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[14] The Second Circuit repeatedly quoted this Court's statement in *Harper & Row, Publishers, Inc. v. Nation Enters.* that the crux of the issue is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Pet. App. 14a, 16a (quoting 471 U.S. at 562). It seemed to believe that Koons' failure to pay a "customary price" by itself rendered his use commercial. But this is obviously circular: it is the failure to pay a "price" to the copyright holder that raises the fair-use issue in the first place. The real question is whether the use makes it more difficult to sell the original work, or derivative rights, *to others*.

avoided any real assessment of this question, by ignoring the obviously distinctive qualities of the Koons sculpture, labelling it a form of commercial exploitation, and thereby simply presuming market injury that was not proved.[15]

3. To be sure, after focusing on Koons' profits, the court of appeals then went on to consider his "contention that the primary purpose of the use was for social comment." Pet. App. 14a. Here, however, it made another fundamental error—holding that while the Koons sculpture might be a "satirical critique of our materialistic society," he could not escape the label of "commercial exploiter" because the object of his critique was not sufficiently well known to be recognizable to those who would view the sculpture. Pet. App. 16a. As a result of this fact, the court held, the sculpture was not a "parody" or "satire" of the photograph, and thus did not qualify for heightened protection.

This aspect of the decision below is also important. Parody and satire, as literary genres, have "thrived from the time of Chaucer," and are "deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In this century, as noted above, it has become commonplace for artists also to use existing images in the creation of new works that criticize what those images represent. These works have become a key part of the "dialogue" between mass culture and its social critics.

As one would expect, works that criticize prior works through parody or satire have long been recognized as

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[15] Respondent offered, in support of his motion for summary judgment, evidence establishing at most a theoretical possibility of sales of the right to produce a derivative sculpture based on his photograph. Petitioner offered affidavits directly contradicting this showing. Because of the *Sony* presumption, the court of appeals ignored this factual dispute and simply speculated that some market injury was "not implausible." Pet. App. 20a.

primary examples of fair use. When such works are challenged under the copyright laws, "copying" in one sense is both undisputed and obvious. But the law is nevertheless receptive to such copying, for two reasons. First, "many parodies are intended as criticisms of the original, and for the author to be able to suppress criticism would interfere with the literary marketplace and distort the test of time." R. Posner, *Law and Literature: A Misunderstood Relation* 350 (1988). Second, "a parody is not intended to be a substitute for the original . . . [and] therefore, except insofar as it is effective criticism, the parody should not diminish the sales of the original author's work and indeed may increase them." *Id.* In sum, this form of copying, in general, does not interfere with any interests that prior copyright holders can legitimately expect to have protected.

Thus, in this case, petitioner openly and deliberately made use of the Rogers photograph in the creation of his sculpture. But the Koons sculpture embodied a deliberate aesthetic transformation of that prior image. The faces of the people were rendered cartoon-like and blank. The dogs, painted blue and given bulbous noses, also had the appearance of cartoon characters. The work as a whole was included in a show condemning the "banality" of popular culture in a prominent New York gallery. On such facts, it can hardly be supposed that petitioner was competing for respondent's audience or otherwise affecting the demand for respondent's "charming" photograph.[16]

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[16] The Second Circuit's failure to recognize the essential differences between the Rogers photograph and the Koons sculpture was also reflected in its handling of a separate issue—"substantial similarity." This requirement, which applies even where, as here, the defendant concedes some degree of actual copying, 3 Nimmer, § 13.03[A], at 13-23, calls for a qualitative determination whether the nature and degree of the copying implicates copyright concerns by affecting the legitimate interests of the creator of the original, *see id.* at 13-45 to -47. In cases like this one, courts often ask whether the "total concept and feel" of the two works is substantially similar. *See, e.g., Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901

The Second Circuit nevertheless held that such an artistic approach is *per se* illegitimate in those cases where the work being criticized, while typical of some aspect of culture, is not itself well known. This holding is supported by some but not all of the rather confused case law in this field.[17] But such a rule ultimately makes no sense. The policies underlying copyright provide no basis for drawing a distinction between parodies of famous works and parodies of lesser-known works that typify something about our culture. *Cf. Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. at 559 ("It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public."). Regardless of the celebrity of the work being criticized, a new creation that sends a different message to a different audience does not supplant the demand for the earlier work and thus does not implicate copyright concerns. *See* 3 Nimmer § 13.05[B], at 13-102.12 ("But if regardless of medium, the defendant's work, although containing substantially similar material, performs a different function than that of the plaintiff's, the defense of fair use may be in-

(9th Cir. 1987) (citing cases). Here, however, the Second Circuit did not even view the actual sculpture, and asked only whether a lay observer would recognize that the Koons sculpture was based in part on the Rogers photograph, Pet. App. 11a—a fact that petitioner had already conceded. It thus gave no weight to the possibility that petitioner's transformation of the photograph, creating an entirely different aesthetic impression, might lead a fact-finder to find no substantial similarity.

[17] *Compare Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.) ("the issue to be resolved . . . is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself"), *aff'd on opinion below*, 623 F.2d 252 (2d Cir. 1980), *with MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (copyrighted work must be "at least in part an object of the parody"), *and Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978) (where prior works are "not also an object of the parody," the "need to conjure them up would be reduced if not eliminated"), *cert. denied*, 439 U.S. 1132 (1979).

voked."),[18] Moreover, there are good reasons relating to artistic authenticity why an artist might choose to base his critique of popular culture on a real (although relatively obscure) image.[19]

The flimsiness of the court's reasoning is apparent from its suggestion that petitioner *could* have mounted a parody defense, if only he had displayed the Rogers photograph with his sculpture. Pet. App. 16a (audience awareness of original "may come from the fact that . . . its existence is in some manner acknowledged by the parodist in connection with the parody"). If the scope of fair use in the parody context is to reflect the underlying goals of copyright, the presence or absence of such a display cannot be a critical factor in the analysis. After all, open acknowledgement of a prior source does not alter the commercial impact of a parody.

Instead, in parody cases as elsewhere, the determination whether a use is presumptively legitimate or commercially exploitive should be undertaken in a manner consistent with this Court's analysis in the *Nation* case. It should turn on whether the new work takes something of value from the prior author or artist—by fulfilling demand for the original or by basing its own appeal in whole or in part on the creative efforts reflected in the

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[18] The Second Circuit stated that allowing parodies of relatively unknown works would mean that there is "no practicable boundary to the fair use defense." Pet. App. 16a. This, of course, is not true. Well-known works are hardly subject to unlimited copying under current standards. A purported parodist of a famous work must show that he in fact is communicating a new and critical message and not engaging in commercial exploitation. *See* pp. 17-18 *infra*. Precisely the same limitation would apply to works making use of lesser-known images.

Indeed, it is the Second Circuit's approach that is truly impracticable. Recognizability is hardly an "either/or" proposition. It is a matter of degree, and depends largely on the particular audience considered.

[19] It would contravene the very essence of the post-modern artistic tradition for an artist like Koons to make up images intended to represent popular culture, rather than incorporating real ones.

prior work. The question should be whether the "parody" is truly a work of criticism, with a distinct message and audience, or is merely an effort to capitalize on the appeal of the original to the commercial detriment of its creator. *See* R. Posner, *supra*, at 350 (drawing a distinction between critical "parodies" and noncritical "burlesques," which merely borrow from a prior work for humorous effect and should not be authorized without consent).

The lower courts have groped toward a recognition of this principle, but without establishing a clear and workable rule. In some cases, where the original work and the "parody" perform different functions in separate genres, the absence of commercial exploitation has been readily recognized. *See, e.g., Berlin v. E.C. Publications, Inc.*, 329 F.2d at 545 (publication of a satirical version of song lyrics in a humor magazine had "neither the intent nor the effect of fulfilling the demand for the original"); *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 211 (D. Mass. 1986) ("It does not appear that [the] reproduction of Haberman's postcards was intended to increase sales of the magazine and, thus, in this fashion, improperly capitalize on Haberman's work."); *id.* ("Haberman markets his works as fine arts photographs and postcards. The *Hustler* reproductions . . . would not serve as suitable substitutes for someone who wished to collect the art . . . ."). Where, however, the two works are in the same genre (*e.g.*, two performed or recorded songs, or two television shows) there remains substantial doubt about when a parody's distinctive message is enough to negate the charge of commercial exploitation. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) ("We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society."); *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204, 211 (2d Cir. 1981) (involving Superman

and the television show "Greatest American Hero") ("we question whether the [parody] defense could be used to shield an entire work that is substantially similar to and in competition with the copyrighted work"). *But see Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (involving the song "When Sunny Gets Blue" and a recorded parody "When Sunny Sniffs Glue") ("The two works do not fulfill the same demand. Consequently, the parody has no cognizable economic effect on the original."); *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153-59 (M.D. Tenn.) (following *Fisher* on similar facts), *app. dismissed*, 929 F.2d 700 (6th Cir. 1991).[20]

Under any view, this case should be seen as one involving a true parody. There may well be cases where a purported parody is nothing more than an effort to appropriate valuable features of a prior work without bothering to create an entirely new one. *See MCA, Inc. v. Wilson*, 677 F.2d at 185 (purported parody song simply sought to capitalize on a popular tune). But here there could be no suggestion that the Koons sculpture lacked a critical message or that its commercial value was enhanced in any way by the selection of the Rogers photograph as a starting point. One reason for this, as the Second Circuit recognized, was that few people who viewed the sculpture were likely even to be aware of the photograph. Yet, ironically, this fact was treated as a decisive consideration confirming that Koons acted "in bad faith, primarily for profit-making motives." Pet. App. 17a.

Petitioner was thus put in a classic "double bind." If he had chosen a well-known image as the basis for his critique, he might have been accused of exploiting existing public recognition. When he chose instead an image

[20] Appropriate disapproval of works that merely "burlesque" prior works for humorous effect, without *criticizing* what those works represent, may well explain the comments in the case law suggesting that a parody must be in part a critique of the work used in its creation. *See* note 17 *supra*.

that typified popular culture but was not well known—at least in the world where his works are viewed and sold—he was labelled a commercial exploiter precisely because his work did not "conjure up" recognition of a prior work. This determination, in turn, led inexorably to a presumption of market injury and a denial of the fair-use defense.[21]

II. THIS CASE MERITS REVIEW BY THIS COURT.

This case involves issues of general importance meriting review by this Court. The decision below is perhaps the most glaring, but hardly the first, example of the difficulties that the lower courts have had in determining whether works are "commercial" and in applying copyright concepts to critical and parodic works. Moreover,

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[21] The court of appeals also ruled that petitioner had used much more of the photograph than was necessary for a valid parody. Pet. App. 18a (applying the third fair-use factor of the "amount and substantiality" of the copying). While some courts have adopted a similar limitation, *see, e.g., Fisher v. Dees*, 794 F.2d at 439 (parody may take "no more from the original than is necessary to accomplish reasonably its parodic purpose"), such a rule serves no legitimate purpose in a case involving a true parody that has a distinct message and audience and does not exploit the commercial value of the original. *See Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) *(per curiam)* ("A parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."); 3 Nimmer § 13.05[C], at 13-102.25 ("But short of such near-verbatim identity of content, the disparity of function between a serious work, and a satire based upon it, will sometimes justify the defense of fair use even where substantial similarity exists."); *cf. Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. at 550 ("'[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.'") (quoting *Folsom v. Marsh*, 9 Fed. Cas. 342, 344 (C.C.D. Mass. 1841)); *Sony Corp. of America v. University City Studios*, 464 U.S. at 447-56 (even total duplication of a prior work may sometimes constitute fair use).

if left undisturbed, the Second Circuit's eager condemnation of petitioner's work as "wilful and egregious" "piracy," Pet. App. 23a, 18a, will have serious practical consequences, inhibiting the creativity of many other artists and authors.

The above discussion shows, at the very least, that this area of the law is grossly in need of clarification. By virtue of the *Sony* presumptions, identification of "commercial" uses of prior works has taken on enormous importance. Yet the courts are far from reaching any consensus about how to make such a determination—sometimes focusing on the profitability of a work but sometimes focusing (more appropriately in our view) on the impact of the work on the commercial interests of the creator of a prior work. *See* note 11 *supra*. The result is a series of decisions that provide little guidance to artists and authors and tend to reflect, more than anything else, the visceral reactions of judges to the merits of particular creative efforts.

This case, involving a new work that sought to criticize the very essence of a prior work, provides an appropriate vehicle for addressing this problem. Parodists, satirists, and other critics, after all, nearly always seek payment for what they produce. A rule labelling such works, on that basis, as "commercial" and therefore presumptively "unfair" would work a major change in the latitude traditionally accorded to those who seek to express themselves through parody.

Moreover, by granting review in this case, the Court could also address the distinctive problems raised by parodies that continue to plague the lower courts. As we have noted, the existing case law is somewhat inconsistent with respect to whether a purported parody must directly criticize a prior work that is recognizable to the audience. *See* note 17 *supra*. The courts are also confused about how to separate true parodies from what Judge Posner has called "burlesques," which simply exploit the popu-

larity of features of prior works. *See* pp. 18-19 *supra*. Such recurrent problems certainly warrant the attention of this Court.

But perhaps the most compelling argument for review here is based on the practical consequences of the ruling below, from a circuit that plays a central role in the administration of the copyright laws. As the court of appeals recognized, the fine arts have in recent years exhibited a strong trend toward works that incorporate images from popular culture. This entire post-modern movement has now been placed in jeopardy by a decision blatantly hostile to such an artistic approach.

The Second Circuit's ruling sends an unmistakable message that use of existing images will be viewed as presumptively illegitimate, even where, as here, there is no realistic concern about interference with the legitimate interests of the creators of those images. *See* M. Buskirk, "Appropriation Under the Gun," *Art in America*, at 37 (June 1992) (citing the "ominous implications" of the Second Circuit's ruling for the post-modern movement). In essence, the court below decreed that artists who sell works incorporating images from the culture at large will be treated as if they are in the "business" of commercial appropriation of the work of others unless they can show that the audience will understand their work as a comment, not just on popular culture, but also on a particular prior work. Even then, if those artists sell their works for substantial amounts of money, it is far from clear that the fair-use privilege will be applied.[22]

The predictable result of this decision will be a spate of lawsuits by copyright holders seeking to profit from the fact that images from popular culture have turned up in the works of post-modern artists. These lawsuits will

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[22] We note that, under the current copyright regime, almost any image that exists in popular culture can claim copyright protection. Thus, post-modern artists have no real choice about selecting images that have the potential for producing copyright challenges.

be brought even where, as here, there is no actual commercial injury. Indeed, they will be brought precisely because copyright holders will object to being held up as representatives of "banal" or otherwise undesirable aspects of our culture.

If such claims are sanctioned, the current evolution of fine arts will be severely affected. Copyright holders certainly are not going to grant licenses to artists seeking to use images in this way. *See Fisher v. Dees*, 794 F.2d at 437 ("Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee.") The net result will be suppression of artistic criticism of popular culture—an outcome that utterly defeats the purposes of copyright because it inhibits creativity while in no way furthering the legitimate interests of copyright holders in profiting from their works in the ways that they would ordinarily anticipate.

Indeed, the effects of the decision below will also reach well beyond the fine arts. Many different kinds of creative activity, in many fields, depend on the use of prior works. It is only where such use in fact threatens commercial injury that the copyright laws should come into play. Yet the ruling below sends an ominous message that even in the absence of actual or potential injury, reliance on the defense of fair use may be a risky proposition. This Court should act to remove this threat to the free flow of legitimate ideas and expression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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